

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
) CC Docket No. 97-158
Southwestern Bell Telephone Company))
) Transmittal No. 2
Tariff F.C.C. No. 73)

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FEDERAL COMMUNICATIONS COMMISSION
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AT&T CORP.'S OPPOSITION
TO SOUTHWESTERN BELL'S PETITION FOR RECONSIDERATION

Pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g), AT&T Corp. ("AT&T") opposes Southwestern Bell Telephone Company's ("SWBT's") Petition for Reconsideration of the Commission's RFP Tariff Rejection Order in this proceeding.¹

SWBT seeks reconsideration of the Commission's decision to reject SWBT's Transmittal No. 2633, under which SWBT proposed to add to its interstate access tariff a new section in which SWBT would include its "response[s] to customer requests for proposal submitted to SWBT in competitive situations."² The Competitive Pricing Division

¹ Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2633, CC Docket No. 97-158, Order Concluding Investigation and Denying Application for Review, released November 14, 1997 ("RFP Tariff Rejection Order").

² Southwestern Bell Telephone Company Tariff F.C.C. No. 73 Transmittal No. 2633, Proposed Section 29.2.

suspended the transmittal and set it for investigation.³ After full investigation, the Commission rejected the transmittal as "violative of section 202(a) of the Communications Act of 1934, as amended, and various specific Commission rules."⁴

SWBT makes three arguments in support of its Petition. First, it contends (at 2-5) that Commission precedent "supports" applicability of the competitive necessity doctrine in this case because none of the cases cited by the Commission specifically forbids its application here.⁵ Second, SWBT argues (at 5-6) that the evidence submitted in support of its Direct Case and in an affidavit attached to the instant Petition refute the Commission's public interest findings in the RFP Tariff Rejection Order. Third, SWBT claims (at 6-7) that "the Commission does not

³ Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No.2633, CC Docket No. 97-158, Suspension Order, DA 97-1251 (Comp. Pric. Div., rel. June 13, 1997) ("SWBT Tariff Suspension Order").

⁴ RFP Tariff Rejection Order at para. 1. Specifically, the Commission determined that, based on the existing record, the competitive necessity doctrine is inapplicable because of the potential for market foreclosure created by the transmittal. Id.

⁵ Moreover, according to SWBT (at 5), when "examined in light of the Decreased Regulation of Basic Telecommunications Services proceeding's tentative conclusion" to extend greater pricing flexibility to local exchange carriers ("LECs"), Notice of Proposed Rulemaking, 2 FCC Rcd 645 (1987), the Commission's decision here is unjustified.

have the authority to preclude SWBT from servicing access markets" because such action is "confiscatory" and violates SWBT's equal protection rights. (Emphasis supplied.)

None of the arguments presented by SWBT warrants reconsideration of the RFP Tariff Rejection Order. SWBT is simply rearguing aspects of its Direct Case -- arguments that the Commission has already fully considered and rejected. Reconsideration is appropriate only where petitioner either shows a material error or omission in the original order, or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters,⁶ neither of which is the case here. Petitions for reconsideration "are not granted for the purpose of debating matters which have already been fully considered and substantively settled."⁷ Not surprisingly,

⁶ See WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied 383 U. S. 967 (1966).

⁷ Regulatory Policy Regarding the Direct Broadcast Satellite Service, Memorandum Opinion and Order, 94 F.C.C. 2d 741, 747 (1983) ("DBS Order"). See also, Applications of Advance, Inc., Focus Broadcast Satellite Company, Home Broadcast TV Partners, National Christian Network, Satellite Development Trust, and Unitel Corporation; for the establishment of interim direct broadcast satellite systems in the 12.2-12.7 GHz frequency band, Memorandum Opinion and Order, 89 F.C.C.2d 177, 188 (1982) ("when a petition for reconsideration raises issues similar to those contained in the petition's original submission, which have already been considered by the Commission, the petition is routinely denied").

SWBT disagrees with the Commission's conclusions; nonetheless, "bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration."⁸

SWBT's first basis for reconsideration -- that none of the cases relied upon by the Commission "pose any bar" to allowing the instant transmittal to take effect -- mischaracterizes the Commission's findings and conclusions here. The Commission did not rule that the competitive necessity defense is unavailable to SWBT as a matter of law. Rather, after exhaustive review of the case law, the Commission concluded that "our precedent does not compel us to apply the competitive necessity doctrine in this case."⁹ Turning to the evidence in the record, including facts related to the competitive market for access services and the scope of pricing flexibility requested by the carrier, the Commission held that

because of our concerns about facilitating the development of competition and preventing foreclosure or deterrence to market entry by new entrants, we decline, based on the record here, to apply the competitive necessity defense to Transmittal No. 2633, a customer-specific tariff

⁸ DBS Order at 747.

⁹ RFP Tariff Rejection Order at para. 40 (emphasis supplied).

offering that is not available to similarly situated customers.¹⁰

This decision was based on reasoned decisionmaking and was plainly within the Commission's discretion.¹¹

SWBT's second argument -- that the weight of the evidence warrants a contrary finding -- is merely a request that the Commission revisit the record. However, as noted above, the Commission thoroughly reviewed and considered the evidence presented by SWBT, which the Commission found "inadequate to demonstrate that sufficient competition exists in Dallas and Houston to justify the grant of the additional pricing flexibility that would be permitted under Transmittal No. 2633 in those cities, much less throughout

¹⁰ Id. at para. 31 (emphasis supplied); see also paras. 41-54.

¹¹ See National Assn. of Regulatory Util. Commrs. v. FCC, 737 F.2d 1095, 1138 (D.C. Cir. 1984) ("expertise and discretion . . . [should] be granted to the Commission in a proceeding which touches on the very core of the rapidly developing telecommunications industry").

SWBT's insistence that the Commission reconsider its decision in light of the record developed in the Decreased Regulation of Certain Basic Telecommunications Services proceeding is misplaced. The Commission terminated this proceeding seven years ago, including the competitive bid proposal contained in it. The Commission held at that time that the record had already become stale in light of changes, inter alia, in intervening regulation that granted the LECs significant pricing flexibility. Order, 5 FCC Rcd 5412 (1990).

SWBT's serving area."¹² Reconsideration is plainly not available to SWBT for this purpose.¹³

Finally, SWBT's claim that the Commission action here "precludes" SWBT from serving access markets is a gross exaggeration and does not rise to a confiscatory action in violation of SWBT's equal protection rights. In order to sustain a taking claim, SWBT "bears the heavy burden of making a convincing showing that [the Commission's action] is unjust and unreasonable in its consequences."¹⁴ Here, SWBT has made no showing that the Commission's decision jeopardizes its financial integrity, leaves it insufficient operating capital, or prevents it from compensating current investors or attracting future investors, which is the

¹² RFP Tariff Rejection Order at para. 47.

¹³ The Commission correctly gave no weight to U S West's submission, which contained no evidence whatsoever of the level of competition faced by SWBT either in the cities which were the subject of the proposed tariffs, or in SWBT's serving areas in general. Indeed, the very fact of U S West's submission -- which attempted to bolster SWBT's case with general information about the purported competitiveness of the exchange access market -- highlights the paltry showing that SWBT itself made.

SWBT's submission, with its Petition, of the affidavit of Douglas Mudd is improper, because the facts in the Mudd affidavit are not new and could have been presented by SWBT in its Direct Case.

¹⁴ Illinois Bell Telephone Company v. FCC, 988 F.2d 1254, 1260 (D.C. Cir. 1993), citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

standard for confiscation.¹⁵ The Commission's actions simply continue the existing scope of regulation of a monopoly LEC's access services to promote the Commission's long-standing public policies.¹⁶ SWBT may continue to offer access services pursuant to the Commission's existing rules and regulations via generally available tariffs, or using its pricing flexibility to provide service under a zone density pricing plan.

¹⁵ See FPC. v. Hope Natural Gas Co., *supra*; Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987). See also In the Matter of 800 Database Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Service, 11 FCC Rcd 15227, 15266-68 (1997); In the Matter of Implementation of Sections of the Cable Televisions Consumer Protection and Competition Act of 1992 Rate Regulation, 8 FCC Rcd 5585, 5586 (1993).

¹⁶ RFP Tariff Rejection Order at para. 54. Cf. Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7451 (1992) ("inadequate restrictions on LEC special access pricing and rate structure could permit competitive abuses, stifling competitive entry"); In the Matter of Administration of the North American Numbering Plan, Carrier Identification Codes, Order on Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking, 1997 FCC LEXIS 5783, 5786-91 (rel. October 22, 1997) ("In the present case, the governmental action cannot be characterized as a physical invasion of [petitioner's] property. Instead, it is more appropriately described as an adjustment to the benefits and burdens of economic life to promote the public good.").

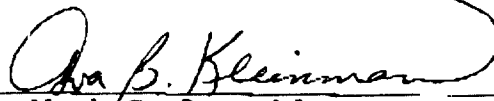
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WHEREFORE, for the reasons stated above, the
Commission should deny SWBT's petition for reconsideration.

Respectfully submitted,

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January 12, 1998

CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 12th day of January, 1998, a copy of the foregoing "AT&T Corp.'s Opposition to Southwestern Bell's Petition for Reconsideration" was served by U.S. first class mail, postage prepaid, to the parties listed below.

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